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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOHN BEEBE, Defendant and Appellant.	C058783 (Super. Ct. No. 07F01597)

Defendant John Beebe was convicted by a jury of seven counts of residential burglary (Pen. Code, § 459),[1] three counts of attempted residential burglary (*id.*, § 459/664), possession of stolen property (*id.*, § 496, subd. (a)), possession of burglary tools (*id.*, § 466), possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), and possession of drug paraphernalia (Health & Saf. Code, § 11364). He was sentenced to an aggregate term of 16 years eight months in state prison.

The sole issue on appeal is whether the trial court erred in admitting defendant's confession at the police station,

[1] Undesignated statutory references are to the Penal Code.

shortly after his arrest. We agree with defendant that the interrogating officer crossed the line into impermissible coercion and implied promises of leniency and that the trial court erred in admitting the confession. We shall reverse three counts of defendant's conviction that were tainted by the admission of the illegal confession. We shall affirm as to the remaining counts, which survive harmless error review.

FACTUAL BACKGROUND

Count One--Gray burglary

On January 23, 2007 (all further calendar dates are to that year) Victor Gray awoke at his residence on Winamac Drive[2] around 4:00 a.m. to get ready for work. He noticed the back sliding glass door was cracked open, which was unusual, since he had closed it the night before. When his wife, Ileen Gray, got up a short while later, she discovered the screen for the kitchen window lying on the grass outside. The window had a handprint on it and the sliding glass door was open a little bit. The Grays later discovered that several valuables were missing, including Ileen Gray's digital camera and Victor Gray's West Coast Choppers watch.

Ten fingerprint impressions were taken from the kitchen window and glass door area. Five of them matched defendant's.

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[2] All the burglaries or attempted burglaries described in counts one through ten occurred within a few blocks of each other in the Natomas section of Sacramento.

The Choppers watch was subsequently found in defendant's bedroom.

Count Two--Fesler burglary

On February 1, Danae Fesler went to bed at her residence on Logansport Way around 12:00 or 12:30 a.m. She made sure the front door was locked, but did not check the windows. The next morning, she and her daughter Branwyn discovered that the kitchen window was open and its screen removed. The desk cabinet had been opened and its contents strewn across the floor. A "Nintendo DS Lite" video game system and numerous game cartridges had been taken. A small amount of money was missing from both the cabinet and Danae Fesler's wallet. Fingerprints lifted from the Fesler home were either inconclusive or did not match defendant's. The video game system and game cartridges, however, were subsequently recovered from defendant's bedroom.

Count Three--Jessee burglary

On February 4, Jennifer Jessee awoke at her home on Mahaska Way around 4:00 a.m. to get a glass of water, when she heard banging in the kitchen and the blinds on the sliding glass door moving. She went into the kitchen and noticed that the blinds were swinging and the back door was open. Her dad's wallet was lying next to the computer and her mom's purse had been moved. She woke up her dad, John Jessee, who discovered that $20 had been taken from the purse and their PlayStation Portable game system was missing. The PlayStation was recovered from defendant's bedroom.

Count Four--Rainey burglary

Around 10:00 p.m. on February 4, Matthew Rainey, Jr., went to bed at his home on Quinter Way. He made sure the front door was locked before retiring.

The next morning Rainey discovered that several cabinets were open and the contents of his backpack were strewn about. His marijuana had been taken from the backpack. He also discovered the garage door and the gate leading into the backyard had been opened. His BMX "trick style" bicycle was missing from the garage. The bicycle was recovered from defendant's bedroom several days later.

Count Five--Halterman burglary

Stephanie Halterman and Janine Schue shared a home on Ottumwa Drive. When Halterman awoke on the morning of February 12, she noticed all of the kitchen drawers and a couple of cabinets were open. Her rent money, $1,600 in cash, was missing from the kitchen table. She also noticed that someone had gone through her car but did not steal anything.

Count Six--Ortiz burglary

On February 12, at around 5:30 a.m., Juan Ortiz woke up at his home on North Platte Way when he heard sounds near his bed. When he opened his eyes, he saw the silhouette of a person, standing next to his bed. Ortiz turned the light on and got a quick glimpse of the burglar, whom he positively identified as defendant. Ortiz shouted and chased defendant out of the house. Although he had locked the front door the night before, Ortiz noticed that its deadbolt had been chiseled and tampered with.

He also discovered that his watch and wallet were missing. A neighbor later found Ortiz's wallet in some nearby bushes; $120 in cash had been taken from it.

Count Seven--Mejia attempted burglary

On February 11 at around 11:00 p.m. Jesus Mejia went to bed at his home on Naponee Court. Before going to bed, he secured all the windows and doors. Because he had heard about the recent burglaries in his neighborhood, he also wedged a chair under the knob of his front door.

The next morning, Mejia noticed that the front door was not closed all the way, although the chair was still in place. Checking the front door, he noticed that the dead bolt had been damaged and the door would not lock properly.

Count Eight--Pizante burglary

On February 12, Adam Pizante retired around 1:00 a.m. at his home on North Platte Way. The doors and windows were locked when he went to bed.

When his wife got up to feed their infant daughter at 3:00 a.m., she heard the family's pet rabbit "thumping" and creaking noises in the house, but it did not alarm her.

The next morning Adam Pizante discovered that all of the kitchen drawers were open. A Game Boy system was missing along with cash from his wallet and his wife's purse. The Game Boy system was later found in defendant's bedroom.

Count Nine--Tran attempted burglary

At 6:30 a.m. on the morning of February 13, Kien Tran awoke to the sound of the front door bell ringing at her home on North Platte Way. She ignored it and lay in bed. When she awoke a couple of hours later, she noticed that the door's deadbolt lock was open and the door frame was chipped, as if someone had picked on it.

Count Ten--Espinoza attempted burglary

At around 2:30 a.m. on February 14, Ernesto Espinoza went to bed at his home on Winamac Drive. As he did, he heard the sound of someone attempting to open the front door. He turned on the porch light and saw a man about 30 years old, 5 feet 9 inches tall and 170 pounds, with short black hair, pass in front of his window and run away. Espinoza called the police and reported that someone was trying to break into his house.

Counts Eleven through Fourteen and defendant's apprehension

Around 2:30 a.m. Officers Roy Hastings and Kenneth Le of the Sacramento Police Department responded to the report of an attempted break-in of Espinoza's home. The subject was described as wearing a hooded sweatshirt.

Officer Hastings, who was on foot patrol in the area, immediately spotted an individual 120 to 130 feet away, walking down the street and wearing a hooded sweatshirt. As Hastings followed, the man turned around quickly, looked at him directly, and then continued walking. The man looked back a second time, then took off running at full stride. Hastings gave chase on foot, but lost sight of him.

By this time, Officer Le and additional officers and a canine unit had arrived at the scene. Two canine announcements[3] were made by an officer. Within 25 minutes, the canine unit apprehended defendant in a bushy area about 30 feet from where Officer Hastings had lost sight of him. The dog bit defendant on the right forearm. Paramedics treated his injuries and released him to police custody.

Officer Hastings conducted a search of defendant and found approximately 1.4 grams of methamphetamine in his pants pocket. Defendant was also carrying a pair of black Toolhandz work gloves, a homemade lock pick set and a small can of pepper spray. In the area where defendant was found hiding, officers recovered a Maglite flashlight and a napkin that contained a narcotics smoking pipe and a Bic lighter.

Defendant's home was within walking distance of the location where Officer Hastings first saw him. A search of defendant's bedroom yielded several items of personal property taken from the burglarized homes in the neighborhood, as well as a flat screwdriver that was bent at a 90-degree angle.

Following defendant's arrest, he was taken to the police station, where he was interviewed by Detective Matthew Garcia for six hours. During the interview, which was played for the

[3] A canine announcement is a warning given to a suspect that a search will be made with a canine. Its purpose is to warn the suspect that if he does not come out of hiding, he may be bitten by the dog.

jury, defendant admitted involvement in the charged neighborhood burglaries, but minimized his participation, claiming he served mainly as a scout or lookout and did so under duress, because he had become involved with unsavory characters from the drug culture who threatened him if he did not assist them. Two officers escorted defendant through the neighborhood, where he pointed out the burglarized homes.

Defendant's housemate testified that, shortly after defendant fell behind on his rent in early February, he began leaving the house late at night and bringing home unusual items, such as a laptop computer and an expensive-looking bike.

Terence Steel, testifying under a grant of immunity, stated that he purchased two video game systems and a digital camera from defendant in the two weeks prior to February 14. As a result of his possession of these items, Steel pleaded guilty to receiving stolen property.

The defense rested without calling any witnesses.

DISCUSSION

I. Admissibility of the Confession

Defendant claims it was error to admit his confession because it was involuntary, having been induced through threats and implied promises of leniency by Detective Garcia. The trial court found it to be a "very close" case, but denied defendant's motion to exclude the confession. We come to a different conclusion than did the trial court.

"'It is axiomatic that the use in a criminal prosecution of an involuntary confession constitutes a denial of due process of law under both the federal and state Constitutions. . . . In California, before a confession can be used against a defendant, the prosecution has the burden of proving that it was voluntary and not the result of any form of compulsion or promise of reward.' [Citation.] . . . In the absence of conflicting testimony, we 'examine the uncontradicted facts surrounding the making of the statements to determine independently whether the prosecution met its burden and proved that the statements were voluntarily given without previous inducement, intimidation or threat.'" (*People v. Cahill* (1994) 22 Cal.App.4th 296, 310 (*Cahill II*), opn. affd. on remand from *People v. Cahill* (1993) 5 Cal.4th 478 (*Cahill I*).)

"'Once a suspect has been properly advised of his rights, he may be questioned freely so long as the questioner does not threaten harm or falsely promise benefits. Questioning may include exchanges of information, summaries of evidence, outline of theories of events, confrontation with contradictory facts, even debate between police and suspect. . . . Yet in carrying out their interrogations *the police must avoid threats of punishment for the suspect's failure to admit or confess particular facts and must avoid false promises of leniency as a reward for admission or confession*.'" (*People v. Flores* (1983) 144 Cal.App.3d 459, 470 (*Flores*), italics added, quoting *People*

v. Nicholas (1980) 112 Cal.App.3d 249, 264; accord, *In re Shawn D.* (1993) 20 Cal.App.4th 200, 211-212 (*Shawn D.*).)

As the California Supreme Court stated in this oft-quoted passage: "When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity. On the other hand, if in addition to the foregoing benefit, or in the place thereof, the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible. The offer or promise of such benefit need not be expressed, but may be implied from equivocal language not otherwise made clear." (*People v. Hill* (1967) 66 Cal.2d 536, 549.)

"In deciding if a defendant's will was overborne, courts examine 'all the surrounding circumstances--both the *characteristics of the accused* and the *details of the interrogation*.'" (*Shawn D.*, *supra*, 20 Cal.App.4th at pp. 208-209, italics added, quoting *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226 [36 L.Ed.2d 854, 862].) "Characteristics of the accused which may be examined include the accused's age, sophistication, prior experience with the criminal justice system and emotional state." (*Shawn D.*, *supra*, at p. 209.)

In *Flores*, *supra,* 144 Cal.App.3d 459, the interrogating officers told the defendant that he could be subjected to the death penalty if he were found guilty of murder and robbery. (*Id.* at pp. 465-466.) One of them remarked, "'Maybe that's not so, you know, but you're the only one that knows that'" (*id.* at p. 471), and suggested there might be a self-defense explanation for the homicide (*id.* at p. 466). The defendant was also told "'we need you to help yourself out of this mess.'" (*Id.* at p. 471.) The appellate court held that defendant's incriminating admissions "were not a product of free intellect and rational choice," but rather the result of "a course of conduct designed at breaking down [his] will." (*Id.* at p. 472.)

In *People v. Denney* (1984) 152 Cal.App.3d 530 (*Denney*), the interrogating officers told the defendant a "hypothetical story" that suggested cooperation and confession might reduce his penalty to five years in prison on a manslaughter conviction, as opposed to a possible life sentence or death penalty. (*Id.* at pp. 540-542.) In holding the confession involuntary, the court found that "[a]ny reasonable person in [defendant's] shoes would have stood on his head or jumped through whatever hoops the officers held out in front of him to obtain the chance of [the] lenient treatment suggested by the officers." (*Id.* at p. 546.)

Cahill's jury convicted him of first degree murder on a felony-murder theory. After the interrogating officer commented that he had "'all the physical evidence in the world'" to prove Cahill was inside the murder victim's residence, he told the

defendant, "'I'm here really to try to see what I can do for you.'" (*Cahill II*, *supra*, 22 Cal.App.4th at p. 305.) The officer then made remarks carrying the clear implication that the "defendant would be tried for first degree murder *unless* he admitted that he was inside the house and denied that he had premeditated the killing." (*Id.* at p. 314.) We held it was error to admit the defendant's confession because, collectively, the officer's statements amounted to an implied promise of leniency if the defendant confessed. (*Id.* at pp. 314-316.) The officer's account of the law of murder was also misleading, in that it omitted any reference to the felony-murder doctrine. (*Id.* at p. 315.)

In this case, defendant was taken to the police station soon after having been bitten severely on the arm by a police canine. The arm continued to bleed through the bandage, and Detective Garcia intermittently gave him napkins to staunch the blood. Defendant was in obvious pain, and was hyperventilating, crying, and extremely emotional throughout the interrogation.

Detective Garcia began the interview by asking defendant if he wanted to see a physician. Defendant answered, "*Yeah*. It--it's numb. My arm is numb right now." (Italics added.) Garcia said, "Okay," but continued as if he had not heard the response.[4]

[4] At one point, defendant told the detective "This--this won't stop bleeding." Detective Garcia's response was to retrieve a garbage can to catch the blood.

Early in the interview, defendant asked Detective Garcia "But am I gonna be able to go home?" Garcia replied "We're gonna have to talk, John, and uh, *depending on your cooperation*, you know, it will depend on a lot." (Italics added.) This amounted to an implied promise that defendant stood a chance of being released if he gave a satisfactory statement to the police. (See *Flores*, *supra*, 144 Cal.App.3d at pp. 471-472.)

The following dialogue then ensues:

"[DEFENDANT]: I'm scared.

"DET. GARCIA: How old are you?

"[DEFENDANT]: I don't want to go to jail.

"DET. GARCIA: I know. But you need to be a man for a second and just talk to me. Okay. Stop crying. And just talk to me about this. I'm here--you know, I'm here just to as much to get your side of the story.

"[¶] . . . [¶]

"[DEFENDANT]: I--

"DET. GARCIA: But I'm also gonna--I'm also gonna tell you that part of my job is to get your story and to find maybe some honesty *or some sort of uh*,--

"[DEFENDANT]: (Unintelligible.)

"DET. GARCIA: --*something that might work for you here.*

"[DEFENDANT]: (Unintelligible.) (Crying.) (Unintelligible.)" (Italics added.)

When defendant expressed fear that he had much to lose, Detective Garcia replied, "*You're gonna lose everything . . .* if

I don't, you know, get . . . *what I need to get*. Okay?" (Italics added.) Defendant continued sobbing and expressing fear that he might go to jail. Garcia said, "I'm not gonna lie to you. You're gonna go to jail. . . . [T]his is a long-term thing. You've got three felony charges here and two misdemeanors and you're on probation. Okay. *You have to work with me on this because you either go to jail for a short period of time or you go to jail for a long period of time*." (Italics added.) When defendant told Garcia that he knew he was facing a minimum six-year prison term, Garcia replied "*Not necessarily*." (Italics added.) The detective explained, "[i]f there's other people involved and you're not the main player and you're not the shot caller, then I need to know that, too, right? Because that's best--*in your best interest*." (Italics added.) Garcia then told defendant there was a difference between being the "shot caller," i.e., a person who is "organizing this whole thing," and someone who might be "just making stupid mistakes 'cause you were on drugs." In encouraging defendant to confess, Garcia stated "The more you help me out with that, *the more I can help you out*. Okay?" (Italics added.)

Finally, Detective Garcia clearly implied he would see to it that defendant suffered adverse consequences if he was not forthcoming with truthful information:

"DET. GARCIA: I want you to be honest 'cause if I find out you're lying to me, John, believe me, I'm gonna be a dick to you and I'm gonna--

"[DEFENDANT]: I just--

"DET. GARCIA: --*you know, throw the book at you type of thing.*

"[DEFENDANT]: That's why I'm saying--

"DET. GARCIA: Okay. I'm just letting you know. Okay?

"[DEFENDANT]: I respect that.

"DET. GARCIA: I'm just gonna--

"[DEFENDANT]: And I thank you.

"DET. GARCIA: I'm just gonna throw it out there that you need to know if you're fucking with me about this stuff, *I'm gonna hammer you*. Okay?

"[DEFENDANT]: I understand.

"DET. GARCIA: If you keep cooperative and you're honest with me, I'll be on your side. *But as soon as you turn me against you, you're gonna get hammered*. (Italics added.)

Although Detective Garcia made several statements that amounted to nothing more than exhortations to be truthful, he adroitly alternated implied promises of leniency with vague threats to elicit admissions from a sobbing, emotional and sometimes hysterical suspect. These tactics exceeded constitutional bounds. (*Denney, supra,* 152 Cal.App.3d at pp. 540-543; *Flores*, *supra*, 144 Cal.App.3d at pp. 470-471.)

The trial court emphasized the fact that most of the cases where confessions have been ruled involuntary involved either unsophisticated or youthful suspects, whereas defendant was 29 years old and had numerous prior run-ins with the law. The

Attorney General places great importance on the fact that Detective Garcia made no mention of specific penalties or sentence outcomes in urging defendant to come clean. Neither point is convincing.

The fact defendant had a prior criminal record is, of course, relevant to our inquiry. However, it is only one factor that goes into the mix. Detective Garcia's suggestion that defendant might receive lenient treatment in exchange for information could well have been extremely effective on someone who, because of his prior commission of less serious crimes, was facing the prospect of a state prison sentence for the first time.[5] As the court noted in *Denney*, "Law enforcement conduct which renders a confession involuntary does not consist only of expressed threats so direct as to bludgeon the defendant into failure of the will. *Subtle psychological coercion suffices as well, and at times more effectively, to overbear a rational intellect and a free will*." (*Denney, supra,* 152 Cal.App.3d at p. 543.)

Nor is it dispositive that Detective Garcia did not mention specific prison terms or sentences. Garcia's statements that defendant needed to "work with [him]" because he was going to prison for "either a long time or a short time"; that defendant was "not necessarily" going to prison for a six-year minimum;

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[5] As an adult, defendant sustained several convictions between 2003 and 2005, but none of them had resulted in a prison sentence.

and his insinuations that if defendant was not the "shot caller" he might receive a lighter sentence, clearly qualified as implied promises of leniency, especially when coupled with Garcia's threats to "hammer you" and "throw the book at you," if defendant did not cooperate.

II. Prejudice

When an involuntary confession is admitted at trial, prejudice from the error is generally viewed under the reasonable probability test embodied in article VI, section 13, of the California Constitution (see *People v. Watson* (1956) 46 Cal.2d 818, 836), unless its exclusion is mandated under the federal Constitution, in which case the more demanding test of harmless beyond a reasonable doubt (see *Arizona v. Fulminante* (1991) 499 U.S. 279, 306-312 [113 L.Ed.2d 302, 329-333]) is applicable (*Cahill I*, *supra*, 5 Cal.4th 478, 509-510). We shall employ the stricter test. (See *Cahill II*, *supra*, 22 Cal.App.4th at pp. 317-319 & fn. 8.)

Both sides agree the admission of the confession affected only the burglary charges. There were 10 burglaries or attempted burglaries, which are reflected in counts one through ten. Defendant claims the error requires reversal of counts two through ten, because although he was found in possession of items stolen from the victims, there was no evidence to connect him to the burglaries other than his confession. The Attorney General concedes that if the trial court erred by admitting defendant's confession, counts two through five and seven

through nine must be reversed, citing additional evidence connecting defendant to counts six and ten. For the reasons that follow, we find the error harmless as to all counts, except five, seven and nine.

Even without defendant's confession, the People presented compelling evidence that this was a discrete series of neighborhood crimes, all of which took place in a limited area within a three-week period. The modus operandi of the offenses was similar--the burglar tried to or did gain quick entry into a home in the middle of the night, rummaged through the house, grabbed easily transportable valuables, and fled.

As to count one, the Gray burglary, the case against defendant was airtight: Defendant was found in possession of a unique "Choppers" watch stolen from the residence and his fingerprints were found at the crime scene.

Nearly as compelling, however, was the evidence on counts six (Ortiz burglary) and ten (Espinoza attempted burglary). Ortiz got a look at the burglar's face as he chased him out of his house and positively identified him at trial as defendant. Espinoza turned on his porch light at 2:30 in the morning when he heard someone trying to open the front door. Espinoza saw the suspect as he fled from the house and called the police, giving them a description of the suspect that very closely resembled defendant's appearance. Within an hour, the officers captured defendant in the bushes only a short distance from the Espinoza home. (See *Cahill I*, *supra*, 5 Cal.4th at p. 505

[erroneous admission of confession generally harmless where defendant apprehended by the police in the course of committing the crime].)

In counts two, three, four and eight, defendant was not connected to the burglaries through fingerprints or positive identification. However, in each of these cases, unique items of personal property belonging to the burglary victims were found in defendant's bedroom. There was no alternate explanation of how defendant might have come into possession of these items. Indeed, defendant's housemate testified that, around the same time as the burglaries were committed, defendant began leaving the house in the middle of the night and coming home with unusual items of personal property. Defendant was found with burglary tools in his possession and there was also evidence that defendant actually *sold* some of the merchandise to a third party. The foregoing evidence convinces us beyond a reasonable doubt that the jury would have convicted defendant of these counts even had the confession not been admitted.

The same does not hold true for counts five (Halterman burglary), seven (Mejia attempted burglary) and nine (Tran attempted burglary). In each of these cases, the evidence showed only a burglary or attempted break-in and nothing more. In the absence of any evidence connecting defendant to these crimes other than temporal and spatial proximity to other charged offenses, we have reasonable doubt that the jury would

have rendered guilty verdicts had it not heard the confession. Thus, these three counts must be reversed.

DISPOSITION

The judgment is reversed as to counts five, seven and nine and the cause remanded to the trial court to permit the People to decide whether to retry defendant on these counts. If the People fail to bring defendant to a new trial on the reversed counts within 60 days (or any extended time limit resulting from defendant's time waiver [§ 1382]), or if they file a written election not to retry defendant, the trial court shall modify the verdict by striking defendant's convictions on counts five, seven and nine, and resentence defendant accordingly. (See *People v. Jones* (1997) 58 Cal.App.4th 693, 720.) In all other respects, the judgment is affirmed.

BUTZ, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.